United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

NO. 76-4228

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RAY MARSHALL, SECRETARY OF LABOR,

Petitioner,

v.

NORTHEAST MARINE TERMINAL COMPANY
and
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Respondents.

ON PETITION TO REVIEW AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

REPLY BRIEF FOR THE SECRETARY OF LABOR

CARIN A. CLAUSS
Solicitor of Labor

BENJAMIN W. MINTZ
Associate Solicitor for
Occupational Safety and Health

MICHAEL H. LEVIN
Counsel for Appellate Litigation

ALLEN H. FELDMAN
Assistant Counsel for
Appellate Litigation

JOHN A. BRYSON
Attorney

U.S. DEPARTMENT OF LABOR
Washington, D.C. 20210
(202) 523-6318

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REPLY BRIEF FOR THE SECRETARY OF LABOR

We have demonstrated in our opening brief that the Commission erred in concluding that the Secretary failed to establish a prima facie case of Northeast Marine Terminal's liability for the cited violations. In reply to Northeast Marine's numerous arguments in defense of this decision, we show below that the rule of liability established in Brennan v. Underhill Const'n. Co., 513 F.2d 1032 (C.A. 2, 1975) applies to places of employment other than construction sites; that the out-of-court declarations of Kiplock, who accompanied the compliance officer on the inspection, were properly admitted and Northeast's objections to the reliability and probative weight of these declarations are without merit; that Northeast Marine was bound by its counsel's admission, contained

in Northeast's response to prehearing orders of the administrative law judge, that Kiplock was its safety director; that Northeast's attempt to inject the compliance officer's credibility into the case must be rejected; and finally that the contention that the citation was not issued with reasonable promptness is both improperly before the Court and unmeritorious.

1. We note first that the issue before this Court is whether the Commission erred in failing to hold that the Secretary established a prima facie case of control by Northeast Marine Terminal Company of the violative conditions found at the worksite occupied by that company and Northeast Stevedoring Company. Northeast Marine repeatedly contends that the Terminal company can be held liable for these violations only if there is proof that its own employees were exposed to hazards it created. (Br. 18-23, 29-31) Such a narrow and restrictive interpretation of the Act is unsupported by the language of the statute and is inconsistent with the broad remedial purpose of this legislation. Moreover, it is contrary to this Court's decision in Brennan v. OSHRC & Underhill Const'n. Co., 513 F.2d 1032 (1975).

Thus, Section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2), requires Northeast Marine Terminal Company to comply with the occupational safety standards promulgated by the Secretary and the language of that section does not confine the statutory obligation to an employer's own employees. Compliance with the Secretary's standards is the chief means of achieving Congress's intent to reduce as far as possible the hazards found at places of employment throughout the country. 29 U.S.C. 651(b)(1); Brennan v. OSHRC & Underhill Const'n. Co., supra, at 1038; Brennan v. OSHRC & Gerosa, Inc., 491 F.2d 1340, 1343 (C.A. 2, 1974). In addition, this remedial legislation has as its broad purpose the prevention of death and disability through the elimination of occupational hazards at the worksite. This end is of course largely defeated when an employer is not held accountable for conditions it creates or controls and which leave unprotected employees on the site no matter who may pay their wages. In fact, this Court has so held in the context of the most common multi-employer situation , the construction site, Brennan v. OSHRC & Underhill Const'n. Co., supra, and that holding is no less applicable to the situation at bar.

Northeast argues however, that the principle announced in Underhill is a narrow exception to the normal rules of liability and that it has no application outside the construction industry, (Br. 30-31), but this contention must fail. First, the decision in Underhill squarely rejects as inconsistent with the broad purposes of the Act the Commission's restrictive interpretation

in that case that an employer's safety obligation extends only to his employees. That inconsistency plainly exists regardless of the nature of the work being performed on a site occupied by one or more employers. The fact that construction work is in general more hazardous than other categories of employment only emphasized, rather than delineated the basic holding that the Commission's narrow interpretation was unreasonable in light of the statutory purpose to eliminate occupational hazards no matter whose employees are endangered. The Court's express holding is stated as follows:

> In a situation where, as here, an employer is in control of an area, and responsible for its maintenance, we hold that to prove a violation of OSHA the Secretary of Labor need only show that a hazard has been committed and that the area of the hazard was accessible to the employees of the cited employer or those of other employers engaged in a common undertaking.

513 F.2d at 1038 (emphasis supplied)

The Court went on to say that:

> [t]he keystone of the Act in short is preventability.... In this regard it is not insignificant that it was [the cited employer] that created the hazards and maintained the area in which they were located. It was an employer on a construction site, where there are generally a number of employers and employees. It had control over the areas in which the hazards were located and the duty to maintain those areas. Necessarily it must be responsible for creation of a hazard.

Id. at 1039 (citation and footnote omitted)

It is plain that the premise of this decision is the situation where one employer creates or controls hazardous conditions in a location where its own employees or those of another employer work, and not that the employers are engaged in construction.

Nor, contrary to its contention, does Northeast's argument gain strength from the decision in Central of Georgia Railroad, 3 CCH ESHG ¶21, 688 (Rev. Comm. 1977), petition for review pending, (C.A. 5, No. 77-2111). In that case the railroad had exposed its employees to unsafe conditions maintained by a manufacturer at its rail shipping facilities and the railroad argued that the special rules ameloriating the liability of subcontractors on construction sites should apply to it. Id. at 26,035-26,036. 1/ Commissioner Cleary, in an opinion not joined

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1/ Anning Johnson Co., 1975-76 CCH OSHD ¶20,690 (Rev. Comm. 1976); Grossman Steel & Aluminum Corp., 1975-76 CCH OSHD ¶20,691 (Rev. Comm. 1976). In these cases the Commission had recognized that the constantly changing environment on a construction site and craft restrictions on the type of work performed by individual employers require some curtailment of the general rule that an employer is responsible for exposing its own employees to hazardous conditions. In this respect the rule in these cases supports the argument that construction sites may be unique when one considers the liability of employers who do not create or control hazardous conditions but whose employees are nonetheless exposed to the danger created by others. This distinction draws support when one considers that non-controlling on a permanent multi-employer worksite may more easily discover hazardous conditions and the risks its employees are exposed to and consequently be better equipped than their construction site conterparts to deal with them. In the instant case however, we are not dealing with a non-controlling employer. The theory of Terminal's liability is control of the hazard, and the rationale underlying Underhill seems clearly to be that no distinction can be made with regard to such an employer's liability irrespective of the situs of the violation. Indeed, Underhill, supra, stands for the proposition that to absolve that employer from responsibility in this circumstance would be unreasonable since it would be antithetical to the purposes of the Act.

by the other commissioners, rejected this argument on the grounds that the modifications referred to applied only to employers on construction sites. It is plain that the sole Commissioner to express this opinion was referring only to employers who do not control or create unsafe conditions; this opinion cannot be read to say that the rule of Underhill with respect to employers who do create or control occupational risks has no applicability beyond the construction site.

In sum, the Underhill decision applies to the situation at bar and supplies the standard by which Northeast's liability must be measured.

2. To establish this element of his case, the Secretary relied on the out-of-court declarations of Kiplock, the man who accompanied the compliance officer throughout the worksite on the two-day inspection, who was known to the compliance officer from a previous inspection as the safety director for the entire complex, who told the compliance officer that he represented both employers for the purposes of this inspection, and who was identified in pre-hearing procedures as Northeast Marine Terminal's safety director and "an expert on terminal activities." (A. 25) The administrative law judge admitted this evidence of his declarations over Northeast Marine's hearsay objections, and it remained totally uncontradicted and unrebutted when Northeast Marine rested without producing any evidence. The Commission refused to give any probative weight to Kiplock's explanations of the Terminal company's responsibilities; Northeast Marine defends this result first by

arguing that this evidence should have been excluded and second by contending that proof of Kiplock's representative status independent of his own statements was required before his declarations could be relied upon. As we show below, both of these arguments must fail.

In the first place, the admission of the evidence was squarely within the discretion of the administrative law judge since there was no jury and the Commission did not even suggest that this exercise of discretion was reversible error; thus the real question here is not admissibility but the probative weight of the evidence. Moreover the rule of liberal admissibility does apply to proceedings before the Commission and is not restricted by the application of any Federal Rule of Evidence. 29 CFR 2200.72 provides:

> Hearings before the Commission and its judges shall be in accordance with section 554 of title 5 U.S.C. and insofar as practicable shall be governed by the rules of evidence applicable in the United States District Courts. (emphasis supplied)

The cited provision of title 5 U.S.C. governs adjudicatory hearings under the Administrative Procedure Act which in turn are conducted pursuant to section 556(d) of that title, which provides that "Any oral or documentary evidence may be received...." In addition, the application of the Federal Rules of Evidence is limited by the words "insofar as practicable," a phrase which also appears in a similar provision of the National Labor Relations Act, 29 U.S.C. 160(b), governing proceedings before the National Labor Relations Board. This phrase has been construed in reviewing NLRB decisions

to sanction the admission of and reliance on evidence otherwise excluded under the hearsay rule applicable in the District Courts. NLRB v. Mastro Plastics Corp., 354 F.2d 170, 179 (C.A. 2, 1975), cert. denied 384 U.S. 972 (1966); NLRB v. Imparato Stevedoring Corp., 250 F.2d 297, 302 (C.A. 3, 1957). As the administrative law judge seemed to recognize, there can be no doubt that it is highly impracticable to disregard the extensive information gathered by questioning employees and employer representatives on the jobsite in order to comply with the inflexible requirements of hearsay provisions of the Federal Rules. Consequently the general rule that hearsay is freely admissible in administrative hearings and can constitute substantial evidence to support findings is fully applicable to the proceedings under review here.

This conclusion is equally valid even in the face of continuing objection to the admission of such evidence, as was the case here. While it is undisputed that the lack of objection will give the evidence its full probative weight, there is no reason not to proceed in the same manner when the objection is not well taken and rests on exclusionary rules designed for jury trials. A timely objection will preserve the party's contention for further review, but it should not be permitted to frustrate the rational evaluation of relevant, admissible evidence.

Both Northeast Marine in its brief and the Commission in its decision have concluded that what Kiplock said to the compliance officer cannot be relied upon unless and until his authority to speak for Northeast Marine is clearly proved, necessarily by

evidence other than his own statements. But to stop at that point is to apply the traditional hearsay rule on representative admissions in a mechanical and unthinking way. The rationale of the hearsay rule is to preserve as much as possible the opportunity to test the credibility of the declarant first hand. On the other hand, if the circumstances surrounding the making of the declaration provide indicia of reliability, it is clearly arbitrary to deny its probative weight by resort to the rubric of "hearsay," in the absence of any rebuttal. The Commission has done precisely this and in effect it has sustained Nowtheast's objection. What remains to be done however is an assessment of the probative weight of this record free of the mechanical application of the hearsay rule. Our opening brief, pp. 16, 18-22, supplies this analysis which concludes that Kiplock's course of conduct throughout the worksite during the two-day inspection is completely consistent with his representations that he was the safety director for the entire complex and that he represented both companies, Terminal as well as Stevedoring, for the purposes of the inspection. There is no reason to doubt that he was anything other than he said he was nor to believe that he did not possess the requisite knowledge to describe the differing functions and responsibilities of the two companies.

Northeast argues that the only inference to be drawn from this evidence is that Kiplock represented Stevedoring only, (Br. 37-38), yet that reasoning ignores the evidence that he exercised his authority throughout the site occupied by <u>both</u> employers and

Kiplock's express representation to the contrary. Clearly, the preponderance of the entire record evidence is to support the proposition that he represented both.

Any residual doubt is conclusively dispelled by the admission of Northeast's counsel, made a short four months after the inspection, that Kiplock was the Terminal Company's safety director and "an expert on terminal activities." This admission, taken in conjunction with the evidence of his conduct during the inspection and his representations then, leads to the inescapable conclusion that he was in fact an authorized representative. The circumstances of this admission make it particularly compelling. Counsel was responding to a prehearing order issued by the administrative law judge pursuant to a Commission rule permitting the judge to direct the exchange of information or to conduct a prehearing conference "...for the purpose of considering matters which will tend to simplify issues or expedite the proceedings." 29 CFR 2200.51(a). Counsel's responses to this order are clearly made in the "management of the litigation," and accordingly, it is binding on Northeast under the test articulated by this Court in Vacarro v. Alcoa Steamship Co., 405 F.2d 1133, 1137 (1968).[2/] A failure to bind

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2/ Taylor v. Allis-Chalmers Mfg. Co., 320 F. Supp. 1381 (E.D. Pa. 1969), aff'd per curiam, 436 F.2d 416 (C.A. 3, 1970), is inapposite since the alleged admission concerned the terms and implementation of an equipment lease, matters clearly beyond the management of litigation. In addition the statement was included in that part of a pre-trial memorandum which was not intended to form the basis of a Rule 16 pre-trial order. Northeast's other cases all involve either out-of-court and off-the-record conversations or inadvertent misstatements subsequently (continued)

the company to factual assertions contained therein would render such prehearing procedures nugatory. See King v. Edward Hines Lumber Co., 68 F. Supp. 1019, 1021 (D. Ore. 1946). Lastly, the judge's order and counsel's response were already part of the official record of this case prior to the hearing; the Commission has certified it as such, (A. 4) as it was required to do by 29 U.S.C. 2112(b) and Rule 16(a), Fed. R. App. P. both of which define the record as including "...the pleadings, evidence, and proceedings before the agency." The Commission rules require that any prehearing order entered by the judge be made part of the record without having been introduced at the hearing, 29 CFR 2200.51(b); there is no reason to treat these documents any differently.

The probative effect of this admission is obvious and fully satisfies any need for corroboration of the representations that Kiplock made at the time of the inspection.

Northeast claims a fundamental unfairness and an infringement on the presumption of its innocence where the Secretary relied, as it does routinely in the enforcement of the Act, on the information and declarations gathered from those persons encountered on its worksite who state that they are its employees or representatives. It must be remembered, however, that Northeast was

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(2/ continued)

corrected, all of which are plainly distinguishable from the circumstances here, where counsel filed a written document in compliance with the judge's order issued in order to achieve simplification of issues and an expeditious hearing.

not indicted for violation of a criminal statute, and that the Secretary is administering, with limited resources, a remedial piece of legislation of unprecedented applicability. It is also clear that the Secretary's burden to establish a prima facie case should be consistent with the liberal interpretation this Congressional action is entitled to.

Here the Secretary has not relied on the declarations of an unidentified person whose credibility the employer cannot assess. His inspection has taken place at a location closed to the public and occupied by the employer, his employees and representatives; the persons interviewed in the course of the inspection looked, talked and acted in a manner consistent with the status they disclosed to the compliance officer. There can be no doubt that the employer knows who his employees and representatives are and it would have imposed no burden on him to require him to show that a particular declarant was not his employee or representative. In these circumstances to affirm the Commission decision means that whenever the Secretary's case is made up of information gathered from employees and employer representatives, the employer may deny these elements any probative value by interposing a single technical objection and escape having to substantiate the hidden premise of such an objection. Such a result can only operate to frustrate effective enforcement of the Act and must be held to be beyond the discretion granted to the Commission.

3. Northeast devotes much of its brief to a repeated attack on the credibility of the compliance officer but its efforts are wasted in this Court, which can hardly make any such assessment on a cold record. Such a judgment is properly reserved for the administrative law judge who in fact did credit the compliance officer, stating that he "...testified to facts from which violations of the standards charged against the respondent could be inferred." (A. 151). The judge vacated the citation only because of the compliance officer's "understandable" inability to state for whom the employees he observed worked for, and that decision is hardly a reflection on the compliance officer's credibility. The judge merely perceived a gap in the compliance officer's knowledge, readily admitted by him, which the judge mistakenly believed was dispositive of the case. The Commission's decision contains nothing which draws the compliance officer's credibility into question; the result is bottomed on a rejection of Kiplock's declarations. In these circumstances credibility is not a legitimate issue in this Court.

Moreover, the alleged testimonial inconsistencies and deficiencies cited by Northeast (Br. 23-27), are explainable or were readily corrected in the course of the examination. None of these trivial examples justifies Northeast's assertion that the compliance officer was unbelievable. All of his

testimony with respect to the presence of a ship is consistent with his statement that a ship arrived at the conclusion of the inspection (A. 57); whether he knew who owned or leased one of the sheds at the worksite is totally irrelevant to the issue of Northeast Marine's control of conditions there; his failure to ask employees who they worked for is explained by his initial assumption that only one employer occupied the site and his use of the words "people" and "persons" with respect to the occupants of the telephone room is hardly a significant difference. The essentials of his testimony, the detailed descriptions of the hazardous conditions and the substance of the closing conference where Kiplock set out the responsibilities of the Terminal company, remain unshaken. There are no grounds for this Court to conclude otherwise or to reject testimony accepted by the judge and the Commission.

4. Lastly, Northeast contends that the Commission's order should be affirmed on the ground that the citations were not issued with "reasonable promptness" as required by section 9(a) of the Act, 29 U.S.C. 658(a). Such a contention is not properly before the Court since the Commission's result is in no way dependent on the resolution of this issue. It is established administrative law that affirmance of the agency's order by a reviewing court must be based on the rationale relied upon by the agency for its disposition, if the principle

of responsible agency decision which underlies the doctrine of primary jurisdiction is not to be subverted. As the Supreme Court has held,

> ...a reviewing court...must judge the propriety of such [agency] action solely by the grounds invoked by the agency. If those grounds are inadequate or improper the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

S.E.C. v. Chenery, 332 U.S. 194, 196 (1947). The Commission rested its decision here solely on its erroneous view of the probative value of the evidence, and review in this Court is limited to that ratio decidendi.

In any event, the Commission has long held that the resolution of such a claim depends on whether the delay has prejudiced the employer in preparing its defense and that the burden of showing such prejudice lies with the employer. Aluminum Coil Anodizing Corp., 3 CCH ESHG ¶21,789 (1977); Louisville & Nashville Railroad Co., 1976-77 CCH OSHD ¶21,310 (1976); Coughlan Construction Co., 1975-76 CCH OSHD ¶20,106 (1975). This interpretation of the requirement of reasonable promptness is mandated by the long-settled rule that agency actions will not be vitiated for failure to follow strictly statutory requirements absent a showing of prejudice by the affected party. United States v. Pierce Auto Freight Lines, 327 U.S. 515, 528, 530 (1946); National Roofing Contractors

Ass'n v. Brennan, 495 F.2d 1294, 1296 (C.A. 7) cert. denied, 419 U.S. 1105 (1974). The broad remedial purpose of the Act requires that it be liberally construed and that the administrative process designed to achieve that end not be impeded by "...formal objections that have no substantial bearing on the ultimate rights of the parties," Market Street R. Co. v. California Freight Comm., 324 U.S. 548, 562 (1945).

This principle has been consistently applied by the Courts of Appeals in disposing of contentions that the failure to adhere strictly to procedural provisions of this Act requires the termination of enforcement proceedings. With respect to employers who allege that they have been denied the right to accompany the compliance officer during the inspection pursuant to section 8(e) of the Act, 29 U.S.C. 657(e), or that they have not been presented with the compliance officer's credentials, as required by section 8(a), 29 U.S.C. 657(a), the courts have unanimously required a demonstration of prejudice before it will sanction the vacation of a citation. Hoffman Const'n. Co. v. OSHRC, 546 F.2d 281, 282-83 (C.A. 9, 1976); Hartwell Excavating Co. v. Dunlop, 537 F.2d 1071, 1073 (C.A. 9, 1976); Chicago Bridge & Iron Co. v. OSHRC & Dunlop, 535 F.2d 371, 375-377 (C.A. 7, 1976); Accu-Namics v. OSHRC, 515 F.2d 828, 833 (C.A. 5, 1975), cert. denied, 425 U.S. 903 (1976). See Brennan v. OSHRC & Bill Echols Trucking Co., 487 F.2d 230, 236 (C.A. 5, 1973)

(failure of the Secretary to transmit promptly a notice of contest to the Commission). The Commission has properly imposed the same requirement when an employer contends that a citation should be vacated for failure to comply with this procedural requirement that citations be issued with reasonable promptness.

The delay in this case was fully explained by the compliance officer in his testimony, Northeast's assertion to the contrary notwithstanding (Br. 47), [3/] and Northeast's vague and conclusory assertions of prejudice do not meet the Commission's requirement. The record shows that Northeast made no concrete demonstration of how the forty-day lapse between inspection and citation prevented it from defending against the allegations. The company now alludes to some unidentified tangible evidence which "perhaps" could have been discovered but such an assertion, made on appeal and wholly unsupported by record evidence, merits nothing but summary rejection. In addition, the suggestion that the Terminal company could reasonably assume it had escaped citation when the Stevedoring company received its citations is patently frivolous and raises no estoppel against the Secretary, especially when the employers knew that each company would be cited for separate violations.

3/ The issuance of the citation was postponed since one potential violation involved a third employer and further investigation was planned. When the compliance officer's (continued)

In sum, the failure of the Terminal company to carry its burden of demonstrating concrete prejudice caused by the delay in this case would conclusively dispose of this issue, had it been the rationale employed by the Commission it reaching its decision. 4/

(3/ continued)

schedule was interrupted by an investigation of a fatal accident, that violation was dropped and the remaining citations then issued (A. 121-22, 126-26).

4/ Finally, contrary to Northeast's contention regarding the Hi-Lo violation (Br. 18 & n. 6), the Secretary does not carry the burden imposed on him by National Realty to demonstrate the feasibility and likely utility of precautionary steps because the violation here is of a specific standard under §5(a)(2) of the Act rather than of the general duty clause §5(a)(1), 29 U.S.C. 654(a). The National Realty court placed that obligation on the Secretary to assure even-handed enforcement of the general duty clause, whose breadth encompassed any number of hazardous situations; as that court recognized, any notice problems are obviated where a specific standard cites particular situations which the employer is obligated to guard against. National Realty & Const'n. Co. v. OSHRC & Secretary, 489 F.2d 1257, 1268 & n. 41 (C.A.D.C., 1973). With respect to the Hi-Lo violation in this case, 29 CFR 1910.178(m)(3) specifically obligates the employer not to permit unauthorized riding and to provide a safe place for authorized riders. Consequently the rationale for imposing the National Realty burden does not exist here.

CONCLUSION

For the above reasons and those contained in the Secretary's opening brief, the Commission's order should be set aside and an order entered holding Northeast Marine Terminal Company in violation of the three cited standards.

Respectfully submitted,

CARIN A. CLAUSS
Solicitor of Labor

BENJAMIN W. MINTZ
Associate Solicitor for
Occupational Safety and Health

MICHAEL H. LEVIN
Counsel for Appellate Litigation

ALLEN H. FELDMAN
Assistant Counsel for
Appellate Litigation

John A. Bryson
JOHN A. BRYSON
Attorney

U.S. DEPARTMENT OF LABOR
Washington, D.C. 20210
(202) 523-6818

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July 1977, copies of the above Reply Brief were served by appropriate mailings, postage prepaid upon the following counsel of record:

Peter M. Panken, Esq.
Johnna G. Torsone, Esq.
Parker, Chapin, Flattan & Klimpl
530 Fifth Avenue
New York, New York 10036

Allen H. Sachsel, Esq.
Appellate Section
Civil Division, Rm. 3535
U.S. Department of Justice
Washington, D.C. 20530

William McLaughlin, Esq.
Executive Secretary
Occupational Safety and Health
Review Commission
1825 K Street, N.W.
Washington, D.C. 20006

John A. Bryson
Attorney